Nos. 17-1717 and 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

JOHN J. PARK, JR.
COUNSEL OF RECORD
STRICKLAND BROCKINGTON LEWIS LLP
1170 PEACHTREE STREET NE
SUITE 2200
ATLANTA, GA 30309
678.347.2208
JJP@SBLLAW.NET

QUESTIONS PRESENTED

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of World War I is an unconstitutional establishment of religion, merely because it is shaped like a cross. The Fourth Circuit reached this conclusion even though the memorial was designed to be a war memorial, has only ever been a war memorial, and is on public land only because of traffic concerns that arose 50 years after the memorial was built.

Petitioners argue that the memorial is not unconstitutional because it is shaped like a cross or for any other reason. More particularly, they address the memorial's constitutionality under the various tests that this Court has identified for evaluating Establishment Clause claims. Amicus ACRU agrees with their arguments and will address another significant, embedded question:

Whether claims of unwelcome contact with religious imagery are sufficient to establish Article III standing.

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STATEMENT OF AMICUS INTEREST[1]

The American Civil Rights Union (the "ACRU") is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division, former Federal Election Commissioner Hans von Spakovsky, and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the First Amendment right to freedom of religious expression. It strongly opposes efforts to eviscerate America's historically-grounded Christian heritage by forcing

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[1] All parties have consented to the filing of this brief by blanket or individual letter. *See* Sup. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

the removal of Christian—and sometimes Jewish—symbols from the public square. The ACRU carries out its mission through a variety of educational and litigation activities, including the participation as *amicus curiae* in cases raising free speech and other constitutional issues, including *Timbs v. Indiana*, No. 17-1091 (argued Nov. 28, 2018); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); and *Citizens United v. FEC*, 558 U.S. 310 (2010). This Court would benefit from the ACRU's perspective and expertise in this case.

SUMMARY OF THE ARGUMENT

These cases raise important questions regarding the constitutionality of a cross-shaped memorial to the fallen of World War I, a passive display that incorporates religious symbolism, under the Establishment Clause of the First Amendment. The preservation of that memorial, and others like it, turn on the result in these cases. Accordingly, this Court can use them to clarify its Establishment Clause jurisprudence.

In addition, in conjunction with *City of Pensacola v. Kondrat'yev*, No. 18-351, in the Supreme Court of the United States, these cases present this Court with an opportunity to consider the circumstances in which a passive display that incorporates religious symbolism gives rise to a cognizable injury sufficient to establish Article III standing. The Bladensburg Cross has been where it is since 1925, and only now has a court declared that it must be demolished or defaced so that it no longer conveys what the lower court sees as a religious message. The Fourth Circuit

said that the individual plaintiffs have standing because they "have each regularly encountered the Cross as residents driving in the area," and that the American Humanist Association had standing because it "has members in Prince George's County who have faced unwelcome contact with the Cross." *American Humanist Ass'n v. Maryland-National Capital Park and Planning Comm'n*, 874 F. 3d 195, 203-04 (4th Cir. 2017).[2]

The injuries recounted by the plaintiffs and recognized by the Fourth Circuit should not give rise to Article III standing. This Court has rejected "stigma[]," "conscientious objection," and "fear" as judicially cognizable injuries. See *Allen v. Wright*, 468 U.S. 737 (1984); *Diamond v. Charles*, 476 U.S. 54 (1986); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), respectively). Irritation at seeing the memorial, without a change in behavior to avoid it, should not be a judicially cognizable injury either. In addition, a reasonable observer would not see the Bladensburg Cross as an attempt to impose a religious message. Rather, it is a constitutional memorial to war dead from the local community.

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[2] The Fourth Circuit found support in *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F. 2d 1098 (11th Cir. 1983). See 874 F. 3d at 203. As Judge Kevin Newsom noted in *Kondrat'yev*, *Rabun* "was wrong the day it was decided" and "has only gotten more wrong as time has passed." *City of Pensacola v. Kondrat'yev*, 903 F. 3d 1169, 1176 (11th Cir. 2018) (Newsom, J., concurring in the judgment).

ARGUMENT

The ACRU will first explain why the American contribution to the Allied victory in World War I and the related commemoration of our war dead are properly remembered. That remembrance includes the Bladensburg Cross. Then, the ACRU will show why the Court should consider standing in these cases and that the Fourth Circuit erred in concluding that the plaintiffs in these cases have standing.

1. The Bladensburg Cross is an appropriate and securely constitutional way to remember the fallen of World War I from Prince George's County.

While World War I began in 1914, the United States did not enter the war until 1917, and American soldiers and Marines started arriving in France in June 1917. Their arrival helped to blunt a German offensive and turn the tide. In all, though, 117,706 American soldiers died from all causes, including combat, and some 30,900 of them are buried in cemeteries in France, Belgium, or England.[3]

The Bladensburg Cross honors 49 of those 117,000 soldiers who came from Prince George's County, MD. Those soldiers are honored because

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[3] See Stephen H. Smith, *Local WWI Veterans buried in Europe* (York Daily Record (Apr. 9, 2017), https://www.ydr.com/story/news/history/blogs/yorkspast/2017/04/09/wwi-vets-buried-in-europe/100255046/.

their mothers did not want them forgotten, and the American Legion helped to commemorate them.

They were part of a military expeditionary force that originated from a military establishment whose land forces "were merely an imperial constabulary and coastal defense force and not an expeditionary army capable of major battle against a major power on a foreign shore." Mark Ethan Grotelueschen, THE AEF WAY OF WAR: THE AMERICAN ARMY AND COMBAT IN WORLD WAR I (Cambridge, 2007), at 11. In May 1918, however, after America entered the War, Congress passed a Selective Service Act, and an expeditionary force was assembled from draftees. In the end, some 2 million American men went to Europe to support the Allies where they "bravely delivered powerful attacks against a much more experienced enemy." *Id.* at 343.

As noted above, the arrival of American troops helped to blunt a German offensive in March 1918. Erich Ludendorff, the German chief of staff, sought to strike "before America could throw strong forces into the scale." John Keegan, THE FIRST WORLD WAR (Vintage 1998) at 393-94. The American Army's 3rd Infantry Division earned the nickname "Rock of the Marne" for its role in stopping the Germans. With the end of the offensive, Allied troops went on the offensive, and American army and Marine soldiers contributed to victories at places like Belleau Wood, Soissons, St. Mihiel, and the Meuse-Argonne.

Ultimately, the Germans sued for an end to the fighting. It was the American contribution that

turned the tide. German General Erich Ludendorff said as much, attributing the German sense of "looming defeat" to "the sheer number of Americans arriving daily at the front." Keegan at 411. So did the German military commander, Paul von Hindenburg, who told interviewers that the American attack in the Argonne Forest won the war: "[W]ithout the American blow in the Argonne we could have made a satisfactory peace at the end of a long stalemate, or at least held our last positions on our own frontier indefinitely – undefeated. The American attack won the war." See David R. Woodward, THE AMERICAN ARMY AND WORLD WAR I (Cambridge 2014), at 379. The late, distinguished military historian John Keegan explains that the American arrival was "deeply depressing" because the Germans had already "destroyed the Tsar's army, routed the Italians and Romanians, demoralized the French and, at the very least denied the British clear-cut victory." *Id.* at 411-12. To the extent that the German calculus was "predicated on calculable force to force," the "intervention of the United State Army had robbed calculation of point." *Id.* at 412.

American soldiers and Marines fought bravely, with 119 of them earning the Medal of Honor, America's highest military honor, some posthumously. The awardees include Captain Eddie Rickenbacker, who attacked seven German planes shooting down 1 Fokker fighter and 1 Halberstadt bomber, and Sergeant Alvin York, who silenced a German machine gun nest and captured 4 officers and 128 men. See https://history.army.mil/moh/worldwari.html#RICK

ENBACKER;
https://history.army.mil/moh/worldwari.html#YORK, respectively.

The Bladensburg Cross honors 49 of America's war dead. They include Captain Lewis Hulbert, who was killed in action at Mont Blanc Ridge and is remembered on a plaque that is at the base of the Bladensburg Cross. Captain Hulbert received the Medal of Honor for his gallantry in the Second Samoan Civil War, as well as a Distinguished Service Cross for his service at Belleau Wood. See https://en.wikipedia.org/wiki/Henry_L._Hulbert. Others remembered were honored with at least 21 medals.

It is clearly appropriate to recall and honor the American contribution to the Allied victory in World War I, and the concomitant sacrifices of those who served and those who died serving, including the 49 men from Prince George's County who are remembered on the Bladensburg Cross. That commemoration has a secular purpose to which the Fourth Circuit gave inappropriately short shrift.

2. The Bladensburg Cross is a war memorial honoring those from the community who died serving their country in World War I not an unconstitutional endorsement of religion.

A. Standing is an important issue that is embedded in this case.

This Court should consider the standing of the appellees because it is a fundamental part of the

constitutional architecture. The ACRU recognizes that neither the American Legion Petitioners nor the Maryland-National Capital Parks and Planning Commission raised standing as a question presented. Even so, this Court should use this case to clarify the rules for determining standing to challenge passive displays that incorporate religious symbolism.

As noted above, the Pensacola Petitioners have expressly raised standing. See Pet. for Cert. *City of Pensacola, Florida, et al. v. Amanda Kondrat'yev, et al.*, No. 18-351, in the Supreme Court of the United States, at i, 10-18. They also see their case as "an ideal companion case" to these cases. *Id.* at 32. The ACRU agrees with that characterization and believes that the standing issue is an inextricable part of these cases.

"No principle is more fundamental to the judiciary's role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Bird*, 521 U.S. 811, 818 (1997). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* at 408. In addition, it "reflects a due regard for the autonomy of those most likely to be affected by a judicial decision." *Diamond v. Charles*, 476 U.S. at 62. Otherwise, the judicial power will be exercised for the benefit of "concerned bystanders, who will

use it simply as a vehicle for the vindication of value interests." *Id.* (internal quotations omitted).

This Court should consider standing in this case because it is a recurring issue. As the Pensacola Petitioners show, the lower courts are divided on the question of the nature of the injury needed to challenge a passive display. See Pet. City of Pensacola, at 14-18. This Court is well aware that passive displays incorporating religious imagery attract Establishment Clause challenges. It should take the opportunity to clarify its standing jurisprudence.

The disposition of the standing question in *Salazar v. Buono*, 559 U.S. 700 (2010), is not to the contrary. There, the Court concluded that the Government could not challenge Buono's standing to bring the case even though it could question his claim for additional relief. The Court noted that, after the Ninth Circuit affirmed the district court's judgment, the Government did not appeal the ruling, so the judgment became final. *Id.* at 711. Buono's attempt to seek additional relief as the circumstances of the case changed was not "an argument about standing, but about the merits of the district court's order." *Id.* at 713.

This case is on direct appeal. Respondents do not seek to enforce a judgment that has become final as the judgment in *Buono* had become. Accordingly, this Court should extend the scope of its review to the standing question.

B. This Court has limited the degree to which psychological injuries can confer standing to challenge governmental actions.

This Court "has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). That determination "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Put simply, a plaintiff must "allege[] such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (internal quotation omitted).

The "irreducible constitutional minimum of standing contains three elements." *Lujan v.* Defenders of Wildlife, 504 U.S. 555, 560 (1992). More specifically, the plaintiff must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal citations and quotations omitted). That "invasion," otherwise known as an "injury in fact" must also have a "causal connection [to] . . . the conduct complained of." *Id.* And, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotations omitted).

While standing may be "predicated on noneconomic injury," *Valley Forge*, 454 U.S. at 486, that injury must still be concrete, particularized, and actual or imminent. Moreover, "[s]ince 1983, the Supreme Court has consistently tightened pleading standards." *Kondrat'yev*, 903 F. 3d at 1176 (Newsom, J., concurring in the judgment).

In *Valley Forge*, which started that tightening, the Court rejected a challenge to the sale of excess military property to a religious college, holding that the plaintiffs lacked standing. It observed, "[T]he Article III requirements of standing are not satisfied by the abstract injury in nonobservance of the Constitution asserted by citizens." 454 U.S. at 483 (internal quotations and ellipses omitted). The Court then concluded that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86.

Two years later, the Court held that parents of African-American children who contended that the Internal Revenue Service was illegally granting tax exemptions to racially segregated educational institutions did not have standing. *Allen v. Wright*. It rejected the contention that the "mere fact" of government aid to segregated schools was an injury that gave rise to standing. *Id.* at 752. That argument failed, in part, because "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on an federal court." *Id.* at 754. In addition, an

allegation of stigmatic injury failed because the plaintiffs were not "personally denied equal treatment." *Id.* at 755. The Court explained, "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Id.* at 755-56.

In *Diamond v. Charles*, the Court held that a pediatrician who sought to defend the constitutionality of four sections of an Illinois abortion law lacked standing. It explained that he was "a private party whose own conduct is neither implicated nor threatened by a criminal statute" and had "no judicially cognizable interest in the Statute's defense." *Id.* at 56. More particularly, "Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest." *Id.* at 57.

Subsequently, the Court found that attorneys and human right organizations whose work was alleged to include overseas telephone calls and e-mail communications did not have standing to challenge the constitutionality of § 1881a of the Foreign Intelligence Surveillance Act. *Clapper v. Amnesty Int'l USA*,. Section 1881 authorized the surveillance of non-US persons believed to be located outside the United States, and the plaintiffs were fearful that their communications would be acquired through the Act's procedures. The Court held that the prospect of future monitoring was speculative, and neither concrete not imminent. *Id.* at 410-14.

The plaintiffs' taking steps to avoid surveillance pursuant to § 1881a were likewise insufficient to establish standing. It would "improperly water[] down the fundamental requirements of Article III" to confer standing on the basis of currently incurred costs and burdens so long as the motivating "fear of surveillance" was not "fanciful, paranoid, or otherwise unreasonable." *Id.* at 416. Those costs and burdens were incurred "in response to a speculative threat" and "simply the product of their fear of surveillance." *Id.* at 416-17.

Just as an alleged constitutional violation, standing alone, does not confer standing, so may an alleged statutory violation likewise fail to establish it. In *Spokeo*, the Court observed that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." 136 S. Ct. at 1549. Nonetheless, such an injury must be both concrete and particularized. A concrete injury must be "'real,' and not 'abstract,'" and a particularized injury "must affect the plaintiff in a personal and individual way." *Id.* The Court reversed the judgment because the injury suffered by Robins was particularized, but not shown to be concrete.

In short, neither "stigma," nor "conscientious objection," nor "fear" is sufficient to establish standing. None of those harms constitutes a "judicially cognizable injury." *Kondrat'yev*, 903 F. 3d at 1176 (Newson, J., concurring in the judgment).

C. Respondents' claims of injury do not confer Article III standing.

The Respondent's claims of injury lack concreteness. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548 (italics in original). The Court explained that it uses the word "concrete . . . to convey the usual meaning of the term—"real" and not "abstract." *Id.* The Respondents' injuries are fundamentally abstract and fail to establish standing for that reason.

In these cases, the Fourth Circuit found that the individual respondents have standing by virtue of "specific unwelcome direct contact with the Cross; that is they have each regularly encountered the Cross as residents driving in the area." 874 F. 3d at 203. The American Humanist Association "has members in Prince George's County who have faced unwelcome contact with the Cross." *Id.* at 204. The courtrejected the contention that none of the respondents has forgone the exercise of a legal right. *Id.* at 203.

As Judge Gregory observed below, however, "the average person in the community may have difficulty viewing" the memorial in its entirety "while stuck in traffic or driving at high speeds." Id. at 220 (Gregory, J., concurring on part and dissenting in part). Even if that difficulty disappears when the legal move to the reasonable observer is made, it suggests that the Respondents' complaints are overstated. Certainly, they are free to ignore it. Respondents appear to be troubled as much by the

idea of a Cross-shaped memorial as by driving by it. Their distaste for the memorial is akin to the "conscientious objection" that was insufficient to confer standing in *Diamond v. Charles*.

Moreover, absent any need to forego the exercise of a legal right, the Respondents' complaint has a theoretical and abstract air about it. Such a forgone right would show that the party complaining has "skin in the game." Without it, the complaint smacks of a heckler's veto. See Br. for the American Legion Petitioners, No. 18-18, in the Supreme Court of the United States, at 43-45. This Court should make it clear that more is needed to establish standing.

3. A reasonable observer would see the Bladensburg Cross as a war memorial that incorporates religious imagery, not as an attempt to advance or endorse religion.

The transmogrification of an idiosyncratic plaintiff with standing into a "reasonable observer" is no panacea. Just as the idiosyncratic plaintiff should not get a veto, the knowledge attributed to the hypothetical reasonable observer can vary with the beholder. The Fourth Circuit's analysis demonstrates that.

Assuming that the endorsement test applies to a memorial to war dead in the form of a cross, the ACRU recognizes that Justice O'Connor, joined by Justice Souter and Breyer, asserted that the "endorsement test" applied in some Establishment Clause cases "necessarily focuses upon the perception of a reasonable, informed observer."

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment). She explained that the "reasonable observer" must be more than just a "casual passerby." *Id.* at 779. More particularly, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community in which the religious display appears." *Id.* at 780.

Such awareness is warranted because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* at 779. Otherwise, "a religious display [would be] necessarily precluded so long as some passerby would perceive a governmental endorsement thereof." *Id.*

In these cases, the Fourth Circuit said that the "sectarian elements" of the memorial "easily overwhelm the secular ones." 874 F. 3d at 208. It did so by focusing on the Cross-shape to the exclusion of the secular elements, context, and history of the memorial.

As Judge Gregory explained, the majority's analysis was short sighted. "Although a reasonable observer would properly notice the Memorial's large size, she would also take into account the plaque, the American Legion symbol, the four-word inscription, its ninety-year history as a war memorial, and its presence within a vast state park dedicated to veterans of other wars." 874 F. 3d at 219 (Gregory,

J., concurring in part, and dissenting in part). He noted, "The Memorial stands at a busy intersection, yet this case is the first time the Memorial has been challenged as unconstitutional. *Id.* at. 220. Judge Gregory "would conclude that a reasonable observer would understand that the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle."

This Court should join Judge Gregory in his analysis of the reasonable observer's understanding.

CONCLUSION

Little more than 100 years ago, the guns fell silent in Europe. The United States left some 31,000 of its soldiers and Marines behind, buried in graveyards in France, Belgium, and England. Forty-nine of them came from Prince George's County, and their Gold-Star mothers sought to honor their memory through the Bladensburg Cross. This Court should not allow their sacrifice to be forgotten or minimized.

For the reasons stated in the Petitioners' briefs and this amicus brief, this Court should reverse the judgment of the Fourth Circuit Court of Appeals and remand this case with instructions to dismiss it.

Respectfully submitted,

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net